

*United States Court of Appeals
for the Second Circuit*



**APPELLANT'S
REPLY BRIEF**

75-1411

ORIGINAL

To be argued by
SPIROS A. TSIMBINOS
EUGENE F. MASTROPIERI

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

DOCKET NO. 75-1411

UNITED STATES OF AMERICA,

Appellee,

- against -

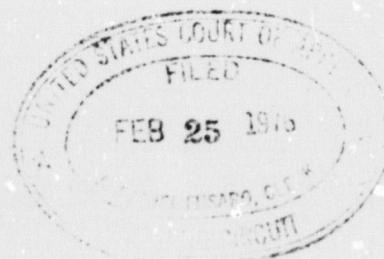
ROCCO MASTRANGELO and
JOSEPH ADDOLORIA,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

JOINT REPLY BRIEF FOR DEFENDANTS-APPELLANTS

SPIROS A. TSIMBINOS
Attorney for Defendant-Appellant
Joseph Addoloria
125-10 Queens Boulevard
Kew Gardens, New York 11415
699-6110



EUGENE F. MASTROPIERI
Attorney for Defendant-Appellant
Rocco Mastrangelo
67-40 Myrtle Avenue
Glendale, New York 11227
821-2210

TABLE OF CONTENTS TO JOINT REPLY BRIEF

	<u>PAGE</u>
Replying to Respondent's Statement of Facts.....	1
POINT I ANSWERING RESPONDENT'S POINT I.....	2
POINT II ANSWERING RESPONDENT'S POINT II.....	3
POINT III ANSWERING RESPONDENT'S POINT III.....	4
CONCLUSION WHEREFORE, THE JUDGMENT OF CONVICTION SHOULD BE REVERSED AND A NEW TRIAL ORDERED.....	6

TABLE OF AUTHORITIES

<u>CASES</u>	<u>PAGE</u>
United States v. Barket, 18 Crl 2429 (8th Cir., Jan. 28, 1976).....	4
United States v. MacDonald, ____-____ (4th Cir., 1976).....	4

JOINT REPLY BRIEF FOR DEFENDANTS-APPELLANTS

REPLYING TO RESPONDENT'S STATEMENT OF FACTS

With regard to the respondent's statement of facts it appears that the respondent is mistaken or has misinterpreted certain of the facts in the record. First of all on page 4 of the respondent's brief the incident involving the Lerner Dress Shops was characterized as having been a hijacking transaction in which the appellants and the other members of the alleged conspiracy participated. The record reveals that Fleischer testified only as to the receipt of stolen goods and discussions by he and the group regarding the ultimate disposition of the stolen items. There was nothing in the record regarding the actual participation of the appellants in the theft of the merchandise (T 97-104, 109).* In addition, the respondent at page 6 of their brief indicates that Addoloria's role in the Arlene hijacking was to block the truck's possible escape with his car. The record reveals no mention regarding this matter but instead Addoloria's role was alleged to have been one of "counting the number of cartons loaded on the truck". (T 121,122).

* T - Refers to Minutes of Trial.

POINT I

ANSWERING RESPONDENT'S POINT I

Respondent states at page 20 that the government offered proof of two other conspiracies/which appellants were involved with each other to commit exactly the same offenses. The government in fact submitted testimony and evidence as to four other alleged crimes having been committed prior to and after the date of the crime charged in the indictment. The Lerner Shops incident involved the crime of Possession of Stolen Goods having occurred two months prior to the date of the crime charged in the indictment and the incidents regarding Liz Cartage Co. and Splendid Form Brassiere Co. occurring some two months after the date of the crime alleged in the indictment. These other crimes included members in addition to those alleged in the original conspiracy and the method of operation was different. The government's proof regarding these other crimes and the presentation of some five witnesses to bolster Fleischer's testimony as to these other crimes was merely for the purpose of showing the appellants' criminal character or disposition. The respondent, in three pages, attempted to gloss over the importance of this issue by attempting to indicate that it falls within the

ordinary category of cases where this Court has on numerous occasions affirmed in instances where evidence of other crimes was admitted on the government's direct case.

The instant case at bar involves a situation where the government's case stood on its own if the testimony of Fleischer was believed by the jury. There was thus no legitimate purpose in bringing forth testimony as to the other hijackings. By the prosecution's action a significant portion of the trial comprised testimony and supportive proof of the commission of other crimes not charged in the indictment. By offering proof of those crimes the government sought to draw an inference that since crimes A, B, D and E had been proved then Fleischer must be telling the truth regarding crime C.

POINT II

ANSWERING RESPONDENT'S POINT II

With regard to the issue of pre-indictment delay it must again be noted that the appellants raised the issue as soon as they became aware of the fact that the government had received information from Fleischer way back in 1972.

They thus acted and raised the issue as soon as possible.

The recent cases of United States v. Jeffrey MacDonald,
____ -- ____ (4th Cir., 1976) and United States v. Barket,
18 CrL 2429 (8th Cir., January 28, 1976) lend additional
support to appellants argument. In these cases two sister
circuits granted motions to dismiss where substantial
pre-indictment delay was present. In the case at bar the
government having gotten all of the information from
Fleischer in 1972 and having investigated the premises
and other aspects of the case in 1973 offers no reason
for waiting until April of 1975 to file an indictment.

POINT III

ANSWERING RESPONDENT'S POINT III

The questions asked by Mr. Mastropieri regarding
the whereabouts of Fleischer's wife and summarized at
page 28 of respondent's brief, were areas of legitimate
inquiry in conjunction with testimony of Fleischer on
direct that he and his wife had received threats. Mr.
Mastropieri at pages 378-380 indicated his basis to the
Court for questions in this area. Defense counsel for
Addolorio had also attempted to go into this area of inquiry.
Thus the response by the Court to defense counsel with
regard to this issue was inappropriate under the circumstances.

Further, as indicated in appellants' brief many of the instances complained of occurred in front of the jury to the point where Mr. Mastropieri's status and effectiveness were downgraded in the eyes of the jury. (T 476, 682).

Thus, in addition to the quotation cited in appellants' brief at page 23, the record also reveals at page 682 that the Court stated in front of the jury:

"What kind of cross-examination is that?
Don't try and confuse the facts. The facts are perfectly clear."

As stated in this Court's own decision in United States v. Coke, 339 F2d 183 (2nd Cir., 1964) the Court must be mindful of admonitions to defense counsel even if warranted where it might improperly prejudice the defendant in the minds of the jury. In the case at bar the prejudice was additionally great since a joint trial was held involving two defendants and the Court's action had a spillover effect to a totally innocent party, the appellant Addolorio.

CONCLUSION

WHEREFORE, the judgment of conviction
should be reversed and a new trial ordered.

Respectfully submitted,

SPIROS A. TSIMBINOS
Attorney for Defendant-Appellant
Joseph Addoloria

EUGENE F. MASTROPIERI
Attorney for Defendant-Appellant
Rocco Mastrangelo

February 23, 1976.



STATE OF NEW YORK, COUNTY OF *Queens*

AFFIDAVIT OF SERVICE BY MAIL

ss.:

being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at
That on the 24th day of Feb 19 deponent served the within
upon *John J. O'Toole* in this action, at *64-15 103rd St.* the address designated by said attorney(s) for that purpose
by depositing a true copy of same enclosed in a postpaid properly addressed wrapper, in — a post office — official
depository under the exclusive care and custody of the United States post office department within the State of New York.
Sworn to before me, this 24th day of Feb 19

George B. Manton
George B. Manton
Court Clerk
County Court
No. 41-25475 Case in Queens County
Queens County Court, 30th 1976



